No. 77-132

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1977

SHARON HILL,	)	
	)	
Appellant,	)	Circuit Ct. No. 6960
	)	
vs.	)	SC No. P-2459
	)	
DAVID MAX GARNER,	)	
	)	
Appellee.	)	

On Appeal from the Supreme Court
of the State of Oregon

JURISDICTIONAL STATEMENT

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In The

SUPREME COURT OF THE UNITED STATES

No.

SHARON HILL,

Appellant,

vs.

DAVID MAX GARNER,

Appellee.

On Appeal From the Supreme Court of Oregon

JURISDICTIONAL STATEMENT

Sharon Hill, the Plaintiff and Appellant below, appeals to the Supreme Court of the United States to review the judgments of the Oregon Supreme Court in the above-entitled proceedings.

OPINIONS BELOW

Two opinions have been rendered by

the Oregon Supreme Court in this case. The first was rendered on March 24, 1977, by Justice Bryson, affirming the trial court's JUDGMENT. Hill v. Garner, 277 Or. 641, 561 P.2d 1016 (1977). On April 26, 1977, the Oregon Supreme Court rendered a decision denying Appellant's PETITION FOR REHEARING, which decision has not been reported as of this writing. See, Appendices A and B.

JURISDICTION

Appellant seeks review of the Judgment of the Oregon Supreme Court affirming the trial court's JUDGMENT NOTWITHSTANDING THE VERDICT[2] on March 24, 1977, and the Oregon Supreme Court's denial of Appellant's PETITION FOR REHEARING on April 26, 1977. The initial proceeding was a common law action for money damages in which the jury returned a verdict for the Plaintiff and assessed damages in the sum of $85,362.95. This verdict was set aside by the trial court judge on the grounds that the evidence presented was insufficient to sustain a finding of gross negligence as required by the Oregon guest statute, Oregon Revised Statutes § 30.115[1], and thereby to justify a verdict in favor of the Plaintiff. The Oregon Supreme Court sustained the validity of such statute in its opinions.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). See,

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1. Oregon Revised Statutes will be hereafter referred to as O.R.S.

2. See Appendix C.

Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S. Ct. 1200, 43 L.Ed.2d 482, reh. denied, 421 U.S. 971, 95 S. Ct. 1969, 44 L.Ed.2d 463 (1975).

The NOTICE OF APPEAL to this Court was filed with the Hood River Circuit Court in Hood River, Oregon, on the 19th day of July, 1977. See, Appendix D.

QUESTION PRESENTED

The question presented by this appeal is:

Is Oregon's guest statute, O.R.S. § 30.115, which prohibited Plaintiff's recovery, invalid on the ground that it is repugnant to the Constitution of the United States, and specifically the Equal Protection and Due Process clauses of the Fourteenth Amendment?

STATUTE INVOLVED

Section 30.115, Volume 1, page 275, Oregon Revised Statutes, provided:

"No person transported by the owner or operator of a motor vehicle, an aircraft, a watercraft, or other means of conveyance, as his guest without payment for such transportation, shall have a cause of action for damages against the owner or operator for injury, death or loss, in case of accident, unless the accident was intentional on the part of the owner or operator or caused by his gross negligence or intoxication. As used in this section:

(1) "Payment" means a substantial benefit in a material or business sense conferred upon the owner or operator of the conveyance and which is a substantial motivating factor for the transportation, and it does not include a mere gratuity or social amenity.

(2) "Gross negligence" refers to negligence which is materially greater than the mere absence of reasonable care under the circumstances, and which is characterized by conscious indifference to or reckless disregard of the rights of others."

STATEMENT OF THE CASE

A. The Facts

On January 5, 1972, Sharon Hill was riding as a passenger in an automobile driven by David Garner, when said vehicle crossed the centerline of a highway and collided with a vehicle travelling in the opposite direction. The evidence presented at trial revealed, in part, that Defendant's tires were substantially bald, that the road on which the parties were travelling was slick and icy (for some unknown reason having been failed to be sanded by the highway crews that morning), and that Defendant was aware of such conditions prior to the collision. From all the evidence presented, the jury could well have concluded that Defendant was negligent in failing to keep a proper lookout, in operating his vehicle at an excessive rate of speed under the circumstances, in failing to maintain his vehicle in a safe operating condition, and in

failing to keep his vehicle under proper control.

At the conclusion of the evidence, the trial court instructed the jury that in order for Plaintiff to recover, they were required to find that Defendant's conduct constituted "gross" negligence as that term is defined by the Oregon statute and by the cases interpreting such statute. Tr. 277-279. Such statute was read to the jury by the court, (Tr. 278), and the difference between "ordinary" and "gross" negligence was explained. Tr. 278-279.

As noted above, the jury thereupon returned a verdict in favor of the Plaintiff, in the amount of $85,362.95. On Defendant's MOTION, the trial court thereafter entered a JUDGMENT NOTWITHSTANDING THE VERDICT and dismissed Plaintiff's COMPLAINT on the grounds that the evidence was insufficient to sustain a finding that the Defendant was "grossly" negligent.

B. Proceedings Below

The validity of Oregon's guest statute was indirectly raised during the pleading stage of this case. Appellant's original COMPLAINT filed on September 23, 1973, had alleged that the Defendants were negligent in certain enumerated particulars. At such time, the status of Oregon law with respect to the validity of the guest statute was uncertain.

As early as 1935, in the case of Perozzi v. Ganiere, 149 Or. 330, 351, 40 P.2d 1009, 1017 (1935), the Oregon Su-

preme Court had upheld the validity of such law. However, just seven months prior the filing of Plaintiff's COMPLAINT, in Brown v. Merlo, 8 Cal.3d 855, 106 Cal. Rptr. 388, 506 P.2d 212 (1973), the California Supreme Court had struck down its own guest statute as repugnant to the Federal and State Constitutions, which statute was similar to the Oregon law. In September of 1973 therefore, it appeared to be a reasonable possibility that the Oregon court would follow California's example and invalidate O.R.S. § 30.115.

A DEMURRER was filed to Plaintiff's COMPLAINT, asserting O.R.S. § 30.115 in support of the same. However, as the Oregon Supreme Court had yet to strike down the Oregon statute, Plaintiff felt compelled under Perozzi to amend her COMPLAINT so as to allege the Defendants' "gross" negligence as required by such statute. Shortly thereafter, in August of 1974, the Oregon Supreme Court gave plenary consideration to the question of the Oregon statute's constitutionality, and held the law valid in three separate decisions. Duerst v. Limbocker, 269 Or. 252, 525 P.2d 99 (1974); Salmon v. Miller, 269 Or. 267, 525 P.2d 104 (1974); Jensen v. Spencer, 269 Or. 411, 525 P.2d 153 (1974).

In view of such rulings, at the trial of this cause on May 27, 1975, Plaintiff did not offer any argument with respect to the federal question herein presented. The futility of such an exercise, in view of the above-cited cases, was apparent.

Appellant raised the question of the validity of this statute in her first brief to the Oregon Supreme Court. See, Appellant's Brief and Abstract of Record, pages 15-17. After reviewing the status of guest statutes throughout the United States, their purposes and failures, and arguing the denial of equal protection resulting from such statutes, Appellant argued (despite the Oregon Supreme Court's several recent decisions to the contrary), that: "Your Appellant respectfully suggests that the Court might again look at the issue of the constitutionality of the Oregon Guest Passenger Statute." See, Appellant's Brief and Abstract of Record, at page 17.

THE FEDERAL QUESTION IS SUBSTANTIAL

A. THE CONFLICT BETWEEN THE STATES ATTESTS TO THE IMPORTANCE OF THE ISSUE, ITS DIFFICULTY, AND THE NEED FOR A CONCLUSIVE DETERMINATION.[3]

Of the approximate 30 states which originally adopted some form of guest passenger legislation, eight states have repealed such laws, two states have restrictively amended them, and the debate in state legislatures continues. Vetri, "The Case For Repeal Of The Oregon Guest Passenger Legislation", 13 WILLAMETTE L.J. 53 (1976). Additionally, as noted in Mr. Justice Brennan's dissenting opinion in Sidle v. Majors, ___ U.S. ___, 97 S. Ct. 366, 50 L.Ed.2d 316 (1976):

"Within only the past five years

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3. Sidle v. Majors, 536 F.2d 1156, 1160 (7th Cir. 1976)

high courts of not less than seventeen states have examined or re-examined their automobile guest statutes challenged as denying equal protection, and almost one-half of those courts have struck down their State's statutes as unconstitutional under both the Federal and State Constitutions."[4]

In view of the above, both the judiciary and the legislatures of the several States have consumed and will continue to consume an enormous amount of time in efforts to resolve the constitutional and socio-economic questions raised by such legislation. In Oregon alone, there have been in excess of 110 guest act cases that have reached the Oregon Supreme Court since the law was enacted in 1927, Vetri, 13 WILLAMETTE L.J. 53, 56, fn. 18.

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4. Since 1973, guest statutes have been struck down as violative of equal protection in the following states: California: Brown v. Merlo, 506 P.2d 212 (Cal. 1973); Idaho: Thompson v. Hagan, 523 P.2d 1365 (Idaho 1975); Kansas: Henry v. Bonder, 518 P.2d 362 (Kan. 1974); Michigan: Manistee Bank & Trust Co. v. McGowan, 232 N.W.2d 636 (Mich. 1975); Nevada: Laakonen v. Eighth Judicial District Court, 538 P.2d 574 (Nev. 1975); New Mexico: McGeehan v. Bunch, 450 P.2d 238 (N.M. 1975); North Dakota: Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974); Ohio: Primes v. Tyler, 43 Ohio St.2d 195, 331 N.E.2d 723 (1975).

Further, lawyers, jurists and other commentators have written hundreds of pages of articles attacking such statutes on workability, economic and equal protection grounds. In this regard, See, Comment, "Constitutionality of Automobile Guest Statutes: A Roadmap to Recent Equal Protection Challenges," 1975 BRIGHAM YOUNG U. L. REV. 99; Weinstein, "Should We Kill the Guest Passenger Act," 33 U. DET. L. REV. 185 (1965); White, "The Liability of an Automobile Driver

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On the other hand, guest statutes have been challenged and upheld in the following states: Arkansas: White v. Hughes, 519 S.W.2d 70 (Ark. 1975), appeal dismissed for want of substantial federal question, 423 U.S. 805, 96 S. Ct. 15, 46 L.Ed.2d 26 (1975); Colorado: Richardson v. Hansen, 527 P.2d 536 (Colo. 1974) (subsequently repealed by statute); Delaware: Justice v. Gatchell, 325 A.2d 97 (Del. 1974); Indiana: Sidle v. Majors, 536 F.2d 1156 (7th Cir. 1976), cert. denied, ___U.S.___, 97 S. Ct. 366, 50 L.Ed.2d 316 (1976); Iowa: Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974); Nebraska: Botsch v. Reisdorff, 226 N.W. 2d 121 (Neb. 1975); Oregon: Duerst v. Limbocker, 525 P.2d 99 (Or. 1974); South Dakota: Behrns v. Burke, 229 N.W.2d 86 (S.D. 1975); Texas: Tisco v. Harrison, 500 S.W.2d 565 (Tex. Civ. App. 1973); (subsequently restrictively amended); Utah: Cannon v. Oviatt, 520 P.2d 883 (Utah 1974), appeal dismissed for want of substantial federal question, 419 U.S. 810, 95 S. Ct. 24, 42 L.Ed.2d 37 (1974), reh. denied, 419 U.S. 1060, 95 S. Ct. 645, 42 L.Ed.2d 658 (1974).

to a Non-Paying Passenger", 20 VA. L. REV. 326 (1934); Allen, "Why Do Courts Coddle Insurance Companies", 61 AM. L. REV. 77 (1927).

Clearly, the debate in the States rages on. See, e.g. the conflict between the California Supreme Court's views and that of the Utah Supreme Court in Brown v. Merlo, supra, and Cannon v. Oviatt, 530 P.2d 883 (Utah 1974), appeal dismissed for want of substantial federal question, 419 U.S. 810, 95 S. Ct. 24, 42 L.Ed.2d 37 (1974), reh. denied, 419 U.S. 1060, 95 S. Ct. 645, 42 L.Ed.2d 658 (1974).

Further, in their decisions on challenges to guest statutes, the state courts have virtually begged this Court for guidance. See, e.g. White v. Hughes, 257 Ark. 627, 519 S.W.2d 70, 71, appeal dismissed for want of substantial federal question, 423 U.S. 805, 96 S. Ct. 15, 46 L.Ed.2d 26 (1975). As the Delaware Supreme Court stated, if the status of the body of law pursuant to Silver v. Silver, 280 U.S. 117, 50 S. Ct. 57, 74 L.Ed. 221 (1929), "...is to be changed and the strictures of the Fourteenth Amendment extended in this area of the law, we shall await the views of the United States Supreme Court on the subject." Justice v. Gatchell, 325 A.2d 97 (Del. 1974).

B. THE FEDERAL COURTS ARE ALSO IN CONFLICT OVER THE VALIDITY OF GUEST STATUTES IN THE FACE OF EQUAL PROTECTION CHALLENGES.

Although the decisions of the federal

courts which have faced the question presented are outwardly harmonious, it is clear from the opinions of such courts that several judges on the federal bench have diametrically opposed views with respect to the constitutionality of such legislation.

Silver v. Silver, supra, is the only decision on the merits of the constitutionality of a guest statute ever handed down by this Court. Because of this 1929 opinion, the ruling of this Court in Hicks v. Miranda, 422 U.S. 332, 95 S. Ct. 2281, 45 L.Ed.2d 223 (1975) (which held that the lower courts are bound by the Supreme Court's summary dismissals as adjudications on the merits), and the summary dismissal for want of a substantial federal question in Cannon v. Oviatt, supra, the lower federal courts have felt themselves bound to uphold the validity of guest statutes presented for their consideration, often despite their own better judgment. See, e.g. Neu v. Grant, 548 F.2d 281, 285 (10th Cir. 1977).

The Seventh Circuit likewise is of the opinion that, at least, the Indiana guest statute violates the Equal Protection clause of the Fourteenth Amendment. Sidle v. Majors, 536 F.2d 1156, 1159 (7th Cir. 1976). After a thorough and reasoned analysis of such statute, the Court stated:

> "We can find no necessary rational relation to a legitimate state interest...that would require us to sustain the legislation." Id. at 1159.

Yet, because of the Supreme Court's refusal to consider the merits of Cannon, supra, and the Hicks v. Miranda decision, the Court stated, "...we are obligated to affirm." Id. at 1160. Finally, as the state courts have requested a definitive answer from the United States Supreme Court, the Seventh Circuit concluded:

> "The frequency with which the question has arisen and the disagreement among the courts attest to the importance of the issue, its difficulty and the need for conclusive resolution so that the present viability of Silver v. Silver can be authoritatively determined." Id. at 1160.

The Eighth Circuit, on the other hand, held in 1949 that the Arkansas guest law was not violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment, and that such statute constituted a valid exercise of the state's police power. Harlow v. Ryan, 172 F.2d 784 (8th Cir. 1949). Similarly, the District Court of Nebraska upheld the constitutionality of that state's law in Stoehr v. Whipple, 405 F.Supp. 1249 (D. Neb. 1976).

From all of the above, can there be any question but that the federal courts are at odds on this issue? The interaction of Hicks v. Miranda and Cannon in both federal and state courts, as Mr. Justice Brennan noted in his dissenting opinion from the dismissal of Sidle, supra, clearly results in a "bias in favor of upholding those statutes."

50 L.Ed.2d at 318. It is obvious that the courts need guidance in this area. An end to the time-consuming and costly debate can only result from an adjudication on the merits after plenary consideration by this Court.

C. ASIDE FROM ALL OF THE ABOVE, OREGON'S GUEST STATUTE IS SIMPLY UNCONSTITUTIONAL IN THAT IT IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE, AND THEREBY VIOLATES THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Statutory classifications violate the Equal Protection clause of the Fourteenth Amendment if they are not rationally related to "some legitimate, articulated state purpose." McGinnis v. Royster, 410 U.S. 263, 270, 93 S. Ct. 1055, 1059, 35 L.Ed.2d 282 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172, 92 S. Ct. 1400, 1405, 31 L.Ed.2d 768 (1972). As the Supreme Court itself recently pronounced, the Equal Protection clause of the Fourteenth Amendment does

> "...deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." Reed v. Reed, 404 U.S. 71, 75, 92 S. Ct. 251, 30 L.Ed.2d 225 (1971).

The rationales traditionally advanced for such statutes, and the Oregon guest

passenger law in particular: the prevention of collusive lawsuits and the encouragement and protection of hospitality (See, Duerst v. Limbocker, supra, 269 Or. at 256), simply are not rationally related to the discrimination between persons and classes of persons created by such law. Without venturing into too much detail or argument, the following is clear:

1. The Oregon statute withdraws a remedy from all injured guests in order to disallow a rare recovery based upon collusion, thereby barring the great majority of valid suits to prevent a few fraudulent claims. Thus, the statute is overinclusive and overbroad.

2. The statute ignores the fact that a guest and host may still circumvent the statute's purposes and maintain a fraudulent claim by arranging for false testimony concerning the host's gross negligence, or the guest's payment for the ride.

3. It completely ignores the prevalence of liability insurance coverage today, "...a factual development which largely undermines any rational connection between the prevention of suits and the protection of hospitality," Brown v. Merlo, supra, 506 P.2d at 215, and which has virtually eliminated any notion of ingratitude which formerly adhered to a suit by a guest against his host. Sidle v. Majors, supra, 536 F.2d at 1157.

4. The irrationality of the statute's classification is aggravated by the

prevalence of "loopholes" "...which fortuitously stay the operation of the statute under a variety of diverse, illogical circumstances." Brown v. Merlo, supra, 506 P.2d at 215. See for example, the Oregon Supreme Court's most recent pronouncement, creating a loophole for a guest who was injured as she was about to enter the host's vehicle and the car moved, Kruse v. Fitzpatrick, 278 Or. 185, 563 P.2d 680 (1977).

5. Collusion in any event is unlikely because attorneys representing the parties would not tolerate such collusion that becomes known to them.

6. Further, the likelihood of collusion is minimal because of the host drivers' recognition that they must testify under oath, their fear that they could be criminally prosecuted for false testimony, and the significant likelihood of increased liability insurance premiums or outright cancellation of their insurance policy.

7. Drivers, in general, are not aware of the statute and its implications, and therefore, as an encouragement to the giving of free rides or hospitality, the statute is ineffective.

8. Finally, the guest statute itself is incompatible with recent legislative action in the State of Oregon; specifically, comparative negligence, no-fault, and joint tortfeasor contribution statutes, O.R.S. 18.470-18.490, O.R.S. 743.800-743.835 and O.R.S. 18.440(1), respectively. For an excellent analysis

of the relationship between these statutes, See, Vetri, 13 WILLAMETTE L. J. at 66-70.

CONCLUSION

This appeal raises an issue of fundamental importance to our system of constitutional due process and equal protection. This Court has not given plenary consideration to the question presented since 1929 when the world of automobiles and liability insurance was in its infancy. The rationales and justifications originally promulgated in support of such legislation simply are no longer furthered by or rationally related to the discrimination between persons similarly situated that is a consequence of such legislation.

In light of modern authority, the widespread availability of liability insurance, the innate overinclusiveness of such laws, whereby meritorious claims fail in an effort to prevent a rare collusive lawsuit, the provisions of the Fourteenth Amendment to the United States Constitution, and the doctrine of fundamental fairness, the Oregon guest statute simply cannot be permitted to stand. As the Seventh Circuit Court stated:

"...we believe that on plenary

review, the Supreme Court would not hold that Silver controls the question before us." Sidle v. Majors, supra, 536 F.2d at 1159.

Respectfully submitted,
LIVELY & WISWALL
By William Wiswall
Jill E. Golden
Of attorneys for
Appellant

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF OREGON

In Banc

SHARON HILL, Appellant,	)	No. 6960
vs.	)	SC P-2459
DAVID MAX GARNER, Respondent.	)	

BRYSON, J.

Plaintiff, a guest passenger, brought this action against the driver of the motor vehicle in which she was riding to recover damages for personal injuries sustained by her in a two-car accident. At the close of evidence, defendant moved for a directed verdict on the ground that no evidence had been presented to prove defendant's guilt of gross negligence. Upon Plaintiff's request, the case was submitted to the jury. O.R.S. 18.140(2). The jury returned a verdict in favor of Plaintiff. Thereafter defendant moved for judgment in favor of defendant notwithstanding the verdict, arguing that "the evidence was insufficient to submit the question of gross negligence to the jury and that the verdict is contrary to the evidence and not in accordance with the instructions." The trial court allowed the motion and

entered judgment in defendant's favor, and plaintiff appeals.

Plaintiff states:

> "The sole question on appeal is whether there was sufficient evidence to enable the jury to find the Defendant grossly negligent."

In her brief, plaintiff also attacks the constitutionality of the Oregon guest passenger statute, O.R.S. 30.115. This court has recently held the statute constitutional. Duerst v. Limbocker, 269 Or. 252, 525 P.2d 99 (1974); Salmon v. Miller, 269 Or. 267, 525 P.2d 104 (1974); and Jensen v. Spencer, 269 Or. 411, 525 P.2d 153 (1974). Therefore, we do not consider plaintiff's assertions of unconstitutionality.

A judgment n.o.v. ought not to be granted if there is any evidence to support the verdict. Williamson v. McKenna, 223 Or. 366, 392, 354 P.2d 56 (1960); Austin v. Sisters of Charity, 256 Or. 179, 183, 470 P.2d 939 (1970). In determining whether there was evidence to support the jury's finding that defendant's conduct constituted gross negligence, we review the evidence in the light most favorable to the plaintiff.

The accident occurred at approximately 7:45 a.m. on the highway connecting the cities of Parkdale and Hood River. At the time of the

accident defendant and plaintiff were on their way to high school. The evidence reveals that defendant's 1962 Impala lost traction on "black ice" while negotiating a gentle right-hand turn, went out of control and struck an auto traveling in the opposite direction. Although the accident concerning the condition of defendant's front tires and that describing the weather conditions at the time of the accident is disputed, the standard of review applicable in cases of this type compels us to find that defendant's tires were substantially bald; that the morning of the accident was cold and misty; and that the pavement was damp but, except for the site of the accident, not icy. Defendant also stated that he encountered some sleet as he was driving towards Hood River. Road conditions, however, were not so severe as to cause the highway crews to sand the highway.

Plaintiff has virtually no remembrance of the accident, having suffered nearly total amnesia with regard to the incident. Plaintiff did testify, however, that during those portions of the trip she did remember, the defendant exercised care in the operation of his vehicle:

"Q At any time during that morning did David [defendant] drive anything but carefully?

"A Yes, he did.

"Q You say he did drive carefully?

"A Yes he did.

"Q All right. Do you recall how fast you drove at any time during that short period?

"A He didn't drive fast."

Defendant testified that he was traveling between 35 and 40 miles per hour at the time of the accident. This testimony was collaborated by Mike Snodgrass, a friend of defendant. Defendant and Snodgrass had made arrangements the day before the accident that defendant would meet Snodgrass in Parkdale, follow him to the Dodge garage in Hood River, and then give him a ride to the high school. Snodgrass testified that he had met defendant according to plan; that they had left Parkdale simultaneously, with Snodgrass in the lead; that he had maintained a speed of between 35 and 40 miles per hour; and that defendant had never passed him.

The evidence is uncontested that the "black ice" was not visible to drivers entering the curve, and that the drivers of the two vehicles which immediately preceeded defendant's car into the curve also lost control of their vehicles. The first of the vehicles was a two-year-old 911T Porsche. The Porsche was equipped with studded radial tires and was traveling at approximately 40 miles per hour when it hit the ice, went out of control and crossed into the wrong lane of traffic.

The second vehicle was the Dodge driven by Mike Snodgrass. This vehicle was equipped with treaded street tires in front and snow tires in the rear. It also was traveling at between 35 and 40 miles per hour at the time it lost traction and went out of control. Both vehicles had already passed through the curve and were out of sight when defendant's vehicle entered the curve.

Plaintiff offered the testimony of an accident reconstruction expert that the friction coefficient (traction) of defendant's vehicle was substantially less than that of a vehicle with properly treaded tires. Plaintiff's expert concluded that defendant could have negotiated the curve without incident at speeds up to 47 miles per hour if his tires had been in good condition. However, there was no evidence that the lack of tread on defendant's tires rendered his vehicle totally unsafe or uncontrollable.

O.R.S. 30.115 prohibits actions by guests in the absence of proof that the accident was intentional or caused by the defendant's gross negligence or intoxication. O.R.S. 30.115(2) defines gross negligence as follows:

> "'Gross negligence' refers to negligence which is materially greater than the mere absence of reasonable care under the circumstances, and which is characterized by conscious indifference to or reckless disregard of the rights of others."

The elements of gross negligence under the statute have been discussed at length in two prior opinions, Bottom v. McClain, 260 Or. 186, 489 P.2d 940 (1971), and Williamson v. McKenna, 223 Or. 336, 354 P.2d 56 (1960). Nothing is to be gained by repeating those discussions here. We note only that in order to show gross negligence it is incumbent upon the plaintiff to prove that defendant's conduct, when measured objectively, reveals "a state of mind indicative of an indifference to the probable consequences of one's acts." This state of mind has been described as an "I don't care what happens" attitude. Bottom v. McClain, supra at 191-92. We find no evidence that plaintiff possessed such a state of mind.

Plaintiff would have this court look to defendant's conduct in deciding to drive to school, knowing as he did the condition of his tires and the weather, to determine whether or not any substantial evidence of gross negligence exists. Plaintiff cites Layman v. Heard, 156 Or. 94, 66 P.2d 492 (1937), for the proposition that driving in poor weather on bald tires is sufficient in and of itself to constitute gross negligence. We do not agree that driving on worn tires in cold and misty weather is sufficient, without more, to establish gross negligence.

In Layman, defendant encountered five or six icy places on the road prior to losing control of his vehicle and consistently ignored requests by his guests to slow down. Passengers

in the vehicle testified that defendant was in an angry mood and actually seemed to drive faster when they requested that he slow down. Here there were no warnings or remonstrations as to defendant's driving by plaintiff, as in Bottom v. McClain, supra.

The evidence presented in the instant case reveals that no icy spots were encountered, other than those at the scene of the accident, and that defendant was driving carefully and at a speed substantially under the posted speed limit. Although plaintiff cannot remember most of the events leading up to the accident, she did testify that defendant drove carefully and that he didn't drive fast. Furthermore, the evidence is conclusive that the "black ice" was not visible to drivers and completely unanticipated by those using the highway that morning. Under these facts, we conclude the court did not err in granting judgment in favor of the defendant n.o.v.

Affirmed.

APPENDIX B

OREGON SUPREME COURT

April 26, 1977

Case Title: Hill v. Garner, SC P-2459

Jill E. Golden
William Wiswall
Attorneys at Law

The Supreme Court has today denied appellant's Petition for Rehearing in the above-entitled matter.

cc - Duane Vergeer

STATE COURT ADMINISTRATOR

By /s/ Marilyn Hartley
Marilyn Hartley
Calendar Clerk

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF HOOD RIVER

SHARON HILL,	)	
	)	
Plaintiff,	)	No. 6,960
	)	
vs.	)	JUDGMENT NOTWITH-STANDING THE VERDICT
	)	
DAVID MAX GARNER,	)	
	)	
Defendant.	)	

The above entitled cause came on for trial before the undersigned on the 27th day of May, 1975, at which time plaintiff appeared in person, and by William H. Wiswall and John L. Svoboda, her attorneys, and the defendant appeared in person and by Duane Vergeer, of counsel for the defendant. A jury was duly empaneled and sworn, and testimony was introduced and heard for and on behalf of each of the parties, and thereafter the Court instructed the jury as to all matters of law pertaining to the evidence and the issues. The jury having retired, returned its verdict into Court in the following terms, to-wit: (title and venue omitted)

> "We, the jury, duly empaneled and sworn, to well and truly try the above entitled case, hereby find our verdict in favor of the plaintiff and against the defendant in the sum of $85,362.95. Dated this 29th day of May, 1975.

/s/ J. T. McGrann
Foreman"

and the defendant having moved for Judgment Notwithstanding said Verdict, and the Court being of the opinion and finding that the evidence introduced at the time of trial was insufficient to sustain a finding that the defendant was grossly negligent or acted in reckless disregard of the plaintiff's rights, and that the verdict is contrary to the instructions and the law, now therefore,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff's Complaint herein be and the same is hereby dismissed notwithstanding the verdict of the jury, and

Judgment is hereby entered in favor of the defendant and against the plaintiff, and further that defendant have and recover his costs and disbursements incurred herein, taxes and allowed in the sum of $_____.

Dated this 24th day of June, 1975.

/s/ John M. Copenhaver
JUDGE

APPENDIX D

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF HOOD RIVER

SHARON HILL,	)	
	)	
Plaintiff,	)	Case No. 6960
	)	
vs.	)	
	)	
DAIVD MAX GARNER,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that SHARON HILL, the Plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Oregon of April 26, 1977, denying Plaintiff-Appellant's Petition for Rehearing, and from the judgment of the Supreme Court of the State of Oregon of March 24, 1977, affirming the Judgment Notwithstanding the Verdict of the Circuit Court of the State of Oregon for the County of Hood River. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

LIVELY & WISWALL

By /s/ William Wiswall
William Wiswall
Of Attorneys for Plaintiff
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Springfield, OR 97477